UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

V. L. JOHNSON, d/b/a V. L.)
JOHNSON LUMBER CO.,)
)
Appellant,)

vs. No. 21998

CHICAGO, MILWAUKEE, ST. PAUL)
& PACIFIC RAILROAD CO.,)
)
Appellee.)

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APPELLANT'S REPLY BRIEF

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Appeal from the United States District Court
for the District of Idaho, Northern Division

HONORABLE RAY McNICHOLS
District Judge.

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McFADDEN & PARK
St. Maries, Idaho 83861
Attorneys for Appellant.

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APPELLANT'S REPLY BRIEF

RESPONSE TO
APPELLEE'S FACTUAL STATEMENT

The appellee railroad company asserts in its Statement of the Case that appellant's factual statement is inaccurate, but in attacking the only specific inaccuracy which appellee purports to find, appellee itself misstates the record. At page 8 of its brief, the appellee says that "appellant alleges that no other common carriers served Elk River." In fact, what we said (appellant's brief, p. 3) was "Defendant is the only rail carrier serving Elk River and the only common carrier hauling lumber from Elk River." These statements are borne out by the record, (Tr. p. 6, l. 8-11) although we recognize that on one occasion, after the termination of the rail service, defendant hired Garrett Auto Freight Company to haul one carload of plaintiff's lumber from Elk River to Bovill. Whether this was done on a common carrier basis or a special contract, the record does not show. With this possible exception, there is no evidence whatever that any common carriers other than appellee were hauling lumber from Elk River.

Appellee attempts to suggest that truck carriage of lumber out of Elk River was readily available and that a substantial quantity of lumber moved that way. Its brief states (pp. 8-9) that Gilbert Dahl moved fifty percent of the produce of his

mill by truck common carrier even before the closing of the tunnel. But the testimony was (Tr. p. 37) that Dahl shipped fifty percent of his produce (which was not lumber) by truck, but some -- if not all -- of it went in his own truck. Whether any of it went by common carrier or even by contract carrier does not appear from the record.

Appellee then continues (p. 9) with one of the sweeping generalizations with which its brief abounds, charging that Johnson "made no effort whatsoever to mitigate his alleged damages." The record belies this statement. He tried shipping by truck to Denver and found that he could not do so except at a substantial loss; he hauled a few carloads of lumber to Bovill for loading and shipping by rail, which necessitated shutting down his sawmill operation and hauling a lift truck back and forth; he contacted numerous sources, including the Interstate Commerce Commission, in an effort to make economically feasible transportation arrangements for his lumber; he made numerous requests and demands upon the railroad for hauling assistance to Bovill or loading assistance at that point. (Tr. pp. 9-12, 24-30) As the record amply shows, appellee's statements that Mr. Johnson made no effort to mitigate his damages and that instead he "chose not to move his produce and waited to sue the railroad for alleged damages" are demonstrably erroneous.

That the appellant was not more successful in mitigating his damages was due to the lack of information and the misinformation given him by the railroad regarding the probable duration of the suspension and the failure or refusal of its

employees to obtain an accurate estimate of the date of resumption of service despite his repeated requests. (Tr. pp. 38-41)

Another of appellee's unfounded generalizations appears at page 3 of its brief, where it is said that "During the period 1954 through 1966, maintenance work as necessary was performed in the tunnel." In support of this statement appellee refers to page 66 of the transcript, line 19, at which point Mr. Pajari testified that maintenance was performed in the tunnel during the period from 1954 to April, 1966. Appellee continues "In 1964 some work other than normal maintenance was contemplated but was not carried out because it was not considered necessary." Appellee infers and would have the Court believe that normal maintenance was carried out during 1964 and 1965 and that it was only some extraordinary job which the railroad decided not to do in those years. Mr. Pajari's testimony leaves no doubt, however, that *the railroad did* *no* *maintenance work on the tunnel in 1964 or 1965.* His own counsel asked him:

> "Q. Was there any maintenance work itself during those years do you know?
>
> A. We had some maintenance work planned according to the record but did not consider it necessary to carry it out." (Tr. p. 70, l. 7-12)

And when cross-examined by appellant's counsel with respect to the railroad's answers to written interrogatories propounded to it by the plaintiff (Rec. pp. 46-53), Mr. Pajari testified -- with apparent reluctance -- as follows:

> "Q. Which is the fact?

"A. I beg your pardon?

Q. Which is the fact -- did you or did you not do maintenance work in 1964 and 1965?

A. What is the question?

THE COURT: The witness previously indicated there was work done in 1964. Counsel is asking him if that is accurate.

A. Apparently on my research I didn't take this seriously and eliminated it, so I will say that the interrogatory is correct for this purpose.

Q. The interrogatories are correct?

A. Yes, sir.

Q. Indicating at any rate that no maintenance or repair work was done in 1964 or 1965?

A. *That's right, yes, sir.*" (Tr. p. 50, l. 13 - p. 51, l. 4)

We must take issue also with that part of appellee's Sstatement of the Case (p. 4) which relates to the closing of the tunnel. It is said that "Pajari received a telephone call that a serious new condition had developed in the tunnel." Appellee is anxious to suggest that this was a <u>new</u> condition, recognized as such by many of the railroad's employees, but Pajari's testimony was that he received a telephone call "stating that a serious development had taken place." (Tr. p. 70, l. 26)

In this same vein appellee refers to isolated fragments of testimony -- more or less out of context -- which might be thought to imply that the partial collapse of the tunnel or shifting of its lining resulted from some unprecedented and

unforeseeable natural disaster. With regard to foreseeability, appellee's brief points out (p. 5) Mr. Pajari's testimony as follows:

"Q. Was that a condition that could have been anticipated?

A. I don't think so."

The Court will observe, however, that this question and answer are followed immediately (Tr. p. 95, l.25) by the following:

"Mr. Park: I object to that as calling for a conclusion. That is one of the main issues in this [case].

The Court: *Sustained.*"

Appellee quotes some more of Pajari's testimony on the issue of foreseeability (p. 5) which seems to indicate that it was Pajari's opinion that the partial collapse -- or whatever it was -- that made necessary the closing of the tunnel could not have been anticipated. But the whole of his testimony on this issue gives quite a different impression. For example:

"Q. I believe you testified that this [phenomenon which allegedly caused the trouble in the tunnel] occurs everywhere; is that right?

A. Yes, this occurs and is due to natural forces.

Q. This is something that must be expected; is that correct?

A. Yes.

Q. And it is something that can be anticipated?

A. Except as to location of occurrence.

Q. Pardon me?

A. Except as to location of occurrence.

Q. You don't know exactly when and where it is going

"to happen but something you can expect -- if you have a tunnel going through a mountain, you can expect sometime it is going to collapse?

A. Not necessarily, but it may collapse.

Q. *This is a phenomenon which can be expected? In other words, it is not something which is completely unanticipated?*

A. *That is right."* (Tr. p. 98, l. 5-24)

Appellee devotes several paragraphs of its brief (pp. 5-7) to the details of the "daylighting" job, in an effort to show that the railroad exercised admirable diligence in restoring service. As shown later herein, this effort fails because the railroad not only could have foreseen *but did foresee* the necessity of either daylighting the tunnel or doing a major overhaul on it and because -- even if the closing of the tunnel had been conclusively proved to have been the necessary and unavoidable result of an act of God -- the railroad, *as a common carrier charged with a public trust*, would not have been justified in causing its shippers substantial loss by delaying the reinstatement of service while it negotiated with the State merely to save itself some money. We have no particular quarrel with the appellee's statement of the facts on this phase of the controversy; we would only point out that, as appellee says (p. 6),"*excavation work was commenced August 23rd and was completed October 14th.*" Thus, assuming that the road would have had to be closed throughout all of the excavation work -- which may or may not have been the case -- this would have

meant a suspension of service of *one month and twenty-four days, not five months and five days!*

Finally, we cannot resist chiding appellee a bit about its indignant assertions at the top of page 8 of its brief. Appellee says: "From 'hearsay' Mr. Johnson concluded that service would be restored in July or on July 15th (Tr. p. 165, l. 9), but such misinformation was never given him by Mr. Holland nor by Mr. Sullivan . . . the only two people on the railroad with whom appellant talked." It is not at all clear that Sullivan never gave Johnson this date -- Johnson says he did (Tr. p. 9, l. 10-16) and we find no point at which Mr. Sullivan denied it. (See Tr. p. 109-110). But, more to the point, it seems to be crystal clear that *the real source of this "hearsay misinformation" was a letter (P. Ex. 3) from J. J. Nentl, Superintendent of the appellee railroad!*

RESPONSE TO APPELLEE'S ARGUMENT

Appellee disposes of the major part of appellant's affirmative argument by the simple expedient of purporting to believe that we are not serious about it.

Thus appellee does not even attempt to dispute our contention that the railroad was liable to Johnson for failing to provide him the transportation services which, by its tariffs, it held itself out to provide, unless it proved that its failure to do so was due solely to an act of God, whether or not it was guilty of negligence. Appellee either fails or refuses to

recognize any distinction between this liability and the usual liability which results from an injury proximately caused by a defendant's negligence. But, as shown in considerable detail in our affirmative brief, a common carrier's liability *arises out of his public trust and need not be shown by the shipper to have resulted from the carrier's negligence.* Secretary of Agriculture vs. U.S. (I.C.C.), 350 U.S. 162, 100 L ed. 173, 76 S Ct. 244; Adams Express Co. vs Croninger (1913), 226 U.S. 491, 33 S Ct. 148. (See also, Appellant's Brief, Section IV).

The burden was on the railroad to prove not only that the closing of the tunnel was necessary and that it made the continuation of service to Elk River *impossible,* but also that the closing resulted solely from an act of God which was not and could not have been foreseen and could not have been prevented or avoided. These things appellee did not prove at the trial *even by a preponderance of the evidence!* Of necessity, therefore, appellee pretends that we are not serious about all that -- all we seriously contend, they say, is that the railroad was "negligent in maintenance."

Consequently, the well-recognized legal principles and undisputed facts set forth in our affirmative brief in support of appellant's basic position stand unassailed.

(1) Appellee's Negligence.

Without conceding for a moment, however, that the railroad's liability herein depends upon a showing of its negligence, we have no hesitation about meeting appellee on this ground, for evidence from which the jury might reasonably have found such negligence is abundant in the record in this case. To

recall only part of that evidence: For eleven years, at least, only temporary, "stop-gap" repairs were made in the tunnel -- placing replacement braces on the "rotten original lining" that could not form a solid backing for them -- trying to "make the tunnel safe for another year or two [from 1955] until we could consummate a deal with the State for daylighting . . ." (Tr. p. 140, l. 19, P. Ex. 5, 10, 17) Recommendations of its own engineers for permanent repair or elimination of the tunnel were disregarded until after it had finally collapsed, for the last time, and had to be condemned. (Tr. pp. 44, 47, 67, 86, P. Ex. 16) Maintenance planned for 1964 was not carried out in that year or the next, even though the section foreman reported June 30, 1964 that the timbers were falling out, the situation was getting worse, and the tunnel was "coming down." (Tr. p. 53, l. 23 - p. 54, l. 25) If this would not have supported a finding by the jury that the railroad was negligent in its maintenance of the tunnel, it is hard to imagine what would.

But appellee -- with admirable discretion -- makes no real effort to deny its negligence. Rather it relies entirely upon an alleged absence of proximate causation; and, unfortunately for appellant, the trial court accepted this specious defense, to the total exclusion of virtually all other considerations.

In this connection, appellee, at page 10 of its brief, again recites those portions of Mr. Pajari's testimony which seem to indicate that the condition which resulted in the

decision to condemn the tunnel was a sudden, unprecedented movement of earth and rock which could not have been anticipated or guarded against. As shown earlier herein and in our affirmative brief (pp. 47 - 54) there was substantial conflict in the evidence on this point. Defendant's answer alleged that service was suspended because of a cave-in, and this was what the Assistant General Manager reported to the General Manager and was the way the problem was usually described. (P. Ex. 13, 14, Tr. pp. 62, 63) Mr. Pajari said at the trial that it was due to a "shifting of the earth and rock and of the tunnel itself", or "a displacement of the *lining of the tunnel*", or "movement of the *frames supporting the rock and earth above the tunnel*". (Tr. p. 77, l. 11; p. 71, l. 13; p. 78, l. 8) The report of the railroad's Regional Engineer, dated May 13, 1966, almost immediately after the inspection tour which resulted in the closing of the tunnel, found "longitudinal movement of the *timber tunnel lining*" and "*vertical load undoubtedly unevenly distributed causing the failure.*" (P. Ex. 12) The Assistant Chief Engineer reported that a B&B repair crew noted "*other failures in the timber frame sets*" in April, and that when Pajari, *et al.* made their May 12 inspection they "*found the report of the B&B Foreman to be correct.*"

Whether these apparently differing analyses may really be consistent to any extent, we are unable to say. But they certainly cast doubt on the trial court's determination that reasonable minds could not differ on the reason for the closing of the tunnel and that it was "unquestionably . . . caused by

an unusual massive movement of earth and not by negligent maintenance.

Likewise, we are unable to rationalize the seemingly conflicting testimony of Mr. Pajari on the issue of foreseeability. As we have previously noted, he testified -- in response to a question by appellee's counsel which the trial judge held to be objectionable -- that he didn't think the condition could have been anticipated. At other times he testified that the shift of rock -- or whatever it was -- was due to natural forces, was something that must be expected, and that it could be anticipated "except as to location of occurrence." (Tr. p. 98, l. 4-12).

Reduced to its lowest terms, appellee's position seems to be as follows: We had had considerable trouble with the tunnel in the past; various recommendations for its permanent repair had been made, but we had not seen fit to follow them. Repairs were made on a "stop gap" basis, to make it safe for another year or two; such repairs were recognized by us as being merely temporary. We found the tunnel in very bad condition in June, 1964 and had recommended maintenance work in 1964 but had not found it necessary to carry it out, which was obviously a wise decision since the tunnel didn't collapse until 1966. We suffered a cave-in in the tunnel in April, 1966, but this was repaired and the tunnel reopened. It had been recognized for many years that sooner or later it would be necessary either to open-cut the tunnel or to line it with concrete. We had done some planning for the open cut several

years before but little or no progress had been made prior to May of 1966 when we condemned the tunnel. Thus, we had had much trouble with the tunnel in the past and knew we were going to have further trouble in the near future; in fact our temporary repairs held together longer than some of our engineers and maintenance employees expected. However when the tunnel got so bad we had to condemn it, the immediate threat (at least in part) was from the forces of nature and not solely from the deterioration and decay of the structure itself. Therefore our negligence was not a proximate cause of the collapse of the tunnel and we are not liable.

That appellee should have been given the opportunity to try to persuade the jury to accept this defense, we submit, is open to serious question, considering the duties owed to the public by a common carrier and the narrowly limited defenses available to it when it fails to perform its common law and statutory duties. But surely, appellant deserved an opportunity to persuade them to a contrary view.

With evident reluctance, appellee, at the end of this section of its brief (p. 12) makes rather oblique reference to an act of God -- which it had expressly asserted as an affirmative defense. (Rec. p. 28) Appellee argues -- quite properly -- that an act of God may be a defense to a carrier in an action for loss of a shipment or an action for failure to provide cars on request. As our affirmative brief freely recognizes, an act of God may be a defense to an action against the carrier for

any failure on its part to discharge its common law and statutory obligations.

However, these truisms have no applicability to the facts of this case, and appellee makes only a limited effort to contend otherwise. In one of its characteristic generalizations, appellee states that "there is no evidence whatsoever that the movement of earth and rock above the tunnel, resulting in the tunnel's closure, could reasonably have been foreseen or anticipated by the railroad." Appellee forgets, apparently, that the burden is on it to prove that it could not have been foreseen or anticipated. But this statement is glaringly inaccurate anyway. As we have pointed out, even Mr. Pajari's testimony recognized that the shifting of earth and rock -- or whatever it was -- was the result of natural forces and could be anticipated. Indeed,he testified *it must be expected.* (Tr. p. 98)

Moreover, it is not disputed that this "act of God" could have been avoided completely if the railroad had followed the recommendations of its own engineers ten years or more earlier, when the job could have been done without disruption of traffic in and out of Elk River. (Tr. p. 137-138). Even an act of God is no defense to a common carrier if it could have prevented or avoided its consequences by the exercise of the utmost care and diligence. U.S. Express Co. v. Kountze Bros., (1869) 75 US (8 Wall) 342, 19 L ed. 457; New York Central RR Co. v. Lockwood (1873) 84 US (17 Wall) 357, 21 L ed. 627; Bell Lumber Co. v. Bayfield Transfer Ry. Co., (Wis) 172 NW 955.

No act of God was shown by appellee; but if one had been, it would avail the railroad nothing, for the collapse of the tunnel could have been prevented by proper maintenance, or the consequences of collapse avoided by diligent effort directed toward permanent improvements at a time when disruption of freight service could have been minimized if not avoided altogether.

(2) Substitute Service

Appellee hurls its strongest attack against what it describes as repeated allegations by appellant that the railroad was under a duty to truck Johnson's lumber out of Elk River or to pay all or part of the cost thereof. We find no such allegations, repeated or otherwise, in the record or in appellant's brief. We do contend, however: that the railroad owed Mr. Johnson a duty to provide him with the service which it held itself out, by its tariffs, as ready and able to perform; or that, if the providing of such service was truly impossible, the railroad was bound to provide the best alternative or substitute service -- to Mr. Johnson and all shippers in Elk River similarly situated (if any) -- which the circumstances made possible, by the exercise of the high standard of diligence imposed upon common carriers. Precisely what these measures might have been we are not required and have not attempted to say. We only submit that it is abundantly clear from the record that *the appellee did not prove that it was impossible* for it to provide any substitute service whatever.

In response to this argument, appellee pretends to see a solicitation by Mr. Johnson of a discriminatory concession.

Wrapping itself in a heavy cloak of righteous indignation, appellee flails this straw man with great gusto, even up to the point of suggesting that Mr. Johnson is guilty of a misdemeanor by even suggesting such a thing (which, of course, he didn't).

In further justification of its failure to give appellant any assistance or cooperation whatever, appellee cites the sanctity of its tariffs. The railroad, it piously intones, could not possibly provide any truck service or loading equipment or other assistance because its published tariffs did not provide for or require such services. We have no quarrel with this argument. The answer to it is, of course, that the railroad -- faced with an emergency, however caused, which was obviously going to continue for some months and threatened to put at least one of the two or three shippers involved out of business -- should have applied to the Interstate Commerce Commission for an order under 49 U.S.C.A. Section 1(15)-(20), authorizing the suspension of service upon such terms and conditions and with such provisions for alternative service as the Commission deemed necessary in the circumstances.

But the point is that the railroad's published tariff -- which did not provide for any truck service out of Elk River or loading facilities at Bovill -- *did provide for service by rail out of Elk River.* This service --which was the only service appellant really desired -- the railroad held itself out as providing and was obligated to provide throughout the more than five months that the line was shut down in and out of Elk River. The tariff remained in effect -- never embargoed, never modified,

never suspended, never even discussed with the I.C.C. or the Idaho P.U.C.-- but the railroad simply refused to perform its obligations under it.*

In view of appellee's utter disregard for the obligations imposed by the published tariffs, its protestations that it couldn't possibly lift a finger to assist its Elk River shippers with their desperate transportation problem during the prolonged suspension of service because its tariffs didn't provide for assistance, are little short of ludicrous.

(3) Reinstatement of Service.

Once again (p. 16), as in its Statement of the Case (p. 5-6), appellee recites the three alternatives which were available to it after it had condemned the tunnel, and the *estimated* time required to accomplish each of them. We do not question the railroad's judgment as to choice of method. Nor do we question the estimate that five or six months would be required to do the daylighting job *in the way in which it was done.* We would agree also that the actual construction work could probably be done only during the short Elk River summer , though not the planning, negotiating, etc.

---

*The railroad seemed to feel that it wasn't necessary to do anything about the tariff, since there were only three or four shippers (outbound). The District Manager of Sales notified the two important customers, and the Bovill station agent, Mr. Holland, told Mr. Johnson orally that they could take no more shipments because the tunnel was condemned. The efficacy of this procedure would seem to be approximately comparable to advising Mr. Johnson by telephone that, without consulting the I.C.C., the railroad had decided to raise his freight rate.

But appellee begs the real questions. These are:

(a) In view of the undisputed fact that the railroad had known for ten or twelve years that this major repair job was necessary, did the railroad meet the high standards of responsibility imposed upon common carriers when it failed to prepare for the work in advance in order to minimize the disruption of freight service?

(b) Having failed to make prior preparations for the daylighting job, was the railroad, as a common carrier, justified in delaying the start of actual repair work while it negotiated with the State to share the cost -- to the shipper's great damage?

If these are fair questions -- and the undisputed evidence in the record establishes that they are -- then each of them demands a negative answer.

Recognizing the need for permanent repairs to the tunnel, the railroad, as early as 1954, made some preliminary investigation of the possibility of a joint venture with the State. (D. Ex. 15, Tr. p. 86, l. 1) The negotiations broke down after a little preliminary work had been done, and the railroad apparently did nothing further with the project until June 16, 1966 -- two months after the April cave-in and more than a month after the freight service had been suspended. (Tr. p. 86, l. 18) The State had contacted the railroad late in 1965 about reviving the joint venture but nothing was done, except to instruct Pajari to review the matter. As late as June 22nd the railroad had still not made up its mind what to do about the tunnel. The

Assistant Chief Engineer's report of that date was still recommending that "we progress our negotiations with the State." (D. Ex. 15) Bids were solicited on July 22nd and a contract let August 17th.

Even assuming that the railroad was justified in waiting for the roof to fall in before doing anything about the leaks, it is obvious that it could have -- and in the exercise of any sort of reasonable diligence should have -- gotten all the preliminary work out of the way in the ten years prior to April, 1966. Appellee refers (p. 6) to: decisions, negotiations with the State, surveys, purchase of land, preparation of plans and specifications, approval of expenditures, advertising and letting of bids and formalization of contracts -- all of which necessarily preceded the actual commencement of work on the project on August 23rd.

If the railroad had undertaken the obviously necessary repair work before the condition of the tunnel grew so bad that it had to be condemned -- as its own engineers had been recommending for years -- all of this preliminary work at least could have been completed while the trains were still running. Mr. Johnson could have operated through the best part of the operating season and, with proper notice from the railroad, could have prepared in advance for the seven week suspension of operations.

Appellee would contend, of course, that no advance preparation was made because the condemnation of the tunnel resulted from an act of God which it had no reason to anticipate.

As we have seen, the evidence establishes the contrary, but -- even if appellee were right; even if the tunnel had been built and maintained to the highest possible standards, and the Almighty Himself had descended without warning and crushed it in His omnipotent hands -- the railroad would still face the burden of proving that it used every reasonable means to reinstate the service at the earliest possible time. And it can't show this either! Its own witness testified that negotiations with the State was one of two major causes for the delay in starting construction (Tr. p. 101, l. 6-12), and that by so delaying the work until after agreement was reached with the State, the railroad realized a substantial saving. (P. 104, l. 19- p.105, l. 1) *Appellee's gain was Mr. Johnson's loss.*

(4) Damages.

Appellee makes no argument on the issue of damages, but merely refers to the trial court's ruling and remarks on this issue, which we have already discussed in our pre-trial brief (pp. 66-74). We are content to leave it at that.

It cannot be denied that appellee's breach of duty did, in fact, damage Mr. Johnson. The railroad was well aware that its failure to serve was having this effect. There was substantial evidence from which the jury could have determined the approximate amount of such damage. It should have been permitted to do so.

CONCLUSION

The evidence in this case shows numerous breaches by appellee railroad of its common law and statutory duties to accept and carry freight and, generally, to exercise the utmost diligence in the discharge of its position of public trust. The railroad failed to sustain its burden of proving a lawful excuse for its breaches of duty, and should be held liable to appellant for his damages resulting therefrom. But we are not asking this Court, of course, for a determination that appellee is liable to appellant. We only ask the Court to hold that the evidence herein, with all inferences which may reasonably be drawn therefrom, when viewed in the light most favorable to plaintiff, presented one or more material questions of fact upon which reasonable men could honestly differ.

This being the issue, the judgment of involuntary dismissal should be reversed and the case remanded for a new jury trial

Respectfully submitted this 15th day of February, 1968.

McFADDEN & PARK

Jerrold E Park

Jerrold E. Park
Attorneys for Appellant
St. Maries, Idaho

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DATED this 13th day of February, 1968.

Jerrold E. Park
Attorney

McFADDEN & PARK
St. Maries, Idaho
Attorneys for Appellant